

Decision **PROPOSED DECISION OF ALJ McKINNEY (Mailed 3/19/2013)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting an Investigation on  
Whether Great Oaks Water Company's  
Failure to Inform the Commission and its  
Staff of its Treatment of Pump Tax  
Revenues Collected from Customers  
Violated the Commission's Rule of  
Practice and Procedure 1.1, the Uniform  
System of Accounts for Class A Water  
Companies, the Rate Case Plan, or Public  
Utilities Code Sections 451 and 794.

Investigation 12-04-011  
(Filed April 19, 2012)

**DECISION RESOLVING INVESTIGATION**

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**DECISION RESOLVING INVESTIGATION****1. Summary**

This decision resolves the investigation into whether Great Oaks Water Company (Great Oaks) violated any legal requirements when, in the course of its 2010-2012 general rate proceeding, Application (A.) 09-09-001, it failed to inform the Commission and its staff of the fact that Great Oaks had withheld payment of pump tax revenues from Santa Clara Valley Water District (SCVWD).

Great Oaks had previously notified the Commission of its litigation with SCVWD regarding the legality of the pump tax. Great Oaks won its suit at the trial court level but SCVWD appealed the decision. Great Oaks continued to collect the pump tax from its customers but held all collected amounts in an escrow account pending outcome of SCVWD appeal. Decision 10-11-034 in A.09-09-001 requested the Safety and Enforcement Division (SED)<sup>1</sup> review whether the failure to inform the Commission of the withholding constituted a violation of certain statutes and Commission orders.

Today's decision finds that Great Oaks did not violate any of the identified statutes or Commission orders. Nonetheless, because a significant amount of Great Oaks' revenue requirement was involved, and because the decision to collect the revenue from ratepayers but not to pay it to SCVWD is highly unusual, Great Oaks should have informed the Division of Ratepayer Advocates

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<sup>1</sup> At the time the division was called the Consumer Protection and Safety Division (CPSD). CPSD was renamed SED on January 1, 2013. For clarity, where possible this decision refers to the division as SED.

that the amount was being withheld. In light of the foregoing, the Commission will not levy penalties or sanctions against Great Oaks in connection with this proceeding, but orders Great Oaks to provide information on the SCVWD litigation in all pending and future rate proceedings.

This decision does not decide if Great Oaks should have asked for permission before withholding payments. That issue can and should be examined in a future general rate case if Great Oaks asks for interest or penalties to be paid by ratepayers.

## **2. Factual Background**

Great Oaks Water Company (Great Oaks) is a Class A water company (over 10,000 service connections) regulated by this Commission. During Great Oaks' last general rate case (GRC) Application (A.) 09-09-001, the Commission learned that Great Oaks had withheld payment of pump tax revenue from Santa Clara Valley Water District (SCVWD) even though Great Oaks continued to collect these amounts from its ratepayers.

The pump tax, also known as groundwater production charges, is treated as a pass-through operating expense. SCVWD charges Great Oaks for groundwater production. Great Oaks then passes this amount through to ratepayers. The pump tax makes up a substantial part of Great Oaks' budget. In A.09-09-001, Great Oaks' GRC for the 2010 – 2012 rate cycle, pump taxes accounted for between approximately 38 percent and 45 percent of the requested revenue requirement for test year July 1, 2010 – June 30, 2011. (Motion of the Division of Ratepayer Advocates to Reopen the Record to Admit Great Oaks' Nondisclosure of Lack of Payment of Groundwater Charges and Request that the Commission Issue an Order to Show Cause for Violation of Rule 1.1 and Possible Violation of Section 2114 at 5 ("groundwater production expenses and forecasted

expenses represent a whopping 38% of its revenue requirements”).); Response of Safety and Enforcement Division to the Motion to Dismiss or For Summary Judgment of Great Oaks Water Company (Safety and Enforcement Division (SED) Response) at 2 (“the funds involved (in the case of Great Oaks) represented approximately 45% of its requested revenue requirement for the test year”).

In 2005, Great Oaks filed Advice Letter 169-W requesting permission to establish a memorandum account to track litigation expenses incurred in its dispute with SCVWD over the pump tax. Great Oaks alleged that SCVWD was discriminating against Great Oaks and its ratepayers in how it charged for water pumped from the ground as opposed to treated surface water. Great Oaks asserted that SCVWD had failed to comply with the voter approved provisions of Article XIII of the California State Constitution (Proposition 218). Great Oaks also asserted that there were misallocations between the water utility and flood control functions managed by SCVWD. The advice letter proposed to cap ratepayer risk for litigation expenses at \$100,000.

The Commission addressed Advice Letter 169-W in Resolution W-4534, adopted in May 2005. The resolution (1) allowed Great Oaks to establish the memorandum account to track litigation expenses, (2) found that the memorandum account could have substantial ratepayer benefits, (3) capped the amount of litigation expenses for which ratepayers were responsible at \$100,000, and (4) found that the lawsuit did not “raise any known critical issues that would require that it be analyzed in a General Rate Proceeding.”

In June 2009, the Superior Court of the State of California in Santa Clara County found for Great Oaks. The court held that SCVWD had failed to comply with Proposition 218 when it set monetary rates for fiscal year 2005-2006.

(Great Oaks Water Co. v. Santa Clara Valley Water District, Case No. 1-05-CV053142 at 2.) Judgment for Great Oaks, in the amount of \$4,623,095.52 plus interest, was issued on February 3, 2010. SCVWD appealed. (Sixth Appellate District Court of Appeal Case No. H035260.) The appealed case relates only to the 2005-2006 fiscal year. Other cases, including the case covering the time period for which Great Oaks withheld payment, were stayed pending the outcome of the appeal.

In April 2009, Great Oaks began to place the pump tax revenue into an interest bearing escrow account with Waddell & Reed Services instead of paying it to SCVWD. (Motion to Dismiss or For Summary Judgment (MSJ) and Memorandum of Points and Authorities (P&A) at 2.) Great Oaks says that it withheld the pump taxes from SCVWD because it was concerned that SCVWD would file for bankruptcy before paying any judgment amounts to Great Oaks. (Id.) Great Oaks believes that by protecting these funds it was acting in the public interest. (Id. at 3.)

Great Oaks filed its GRC application for 2010-2012 rate cycle (A.09-09-001) on September 3, 2009. In the application, Great Oaks estimated the pump tax as an operating expense and forecast the amounts it would be required to pay through 2012. Great Oaks did not mention that it was withholding payment of the pump tax revenues to SCVWD.

In March 2010, after the evidentiary record had closed in A.09-09-001, SCVWD informed Division of Ratepayer Advocates (DRA) that Great Oaks had been withholding the pump tax. At that time the outstanding pump tax totaled \$4,856,030. (Consumer Protection and Safety Division Investigative Report on Great Oaks Water Company, April 11, 2012 (SED Report) at 3.) DRA filed a motion requesting the evidentiary record be reopened to add information

regarding Great Oaks' failure to pay the pump tax and to request that the Commission issue an order to show cause for an alleged violation of Rule 1.1 of the Commission's Rules of Practice and Procedure.<sup>2</sup>

On March 31, 2010, Great Oaks filed its annual report for calendar year 2009. The report included balance sheets showing an unusually large ending balance for accrued liabilities because of the large sum of recorded pump taxes payable during the year. The report also had a line item for interest on unpaid pump taxes. Great Oaks was not required to include the balance sheet with the materials originally filed in A.09-09-001.

On June 21, 2010, the assigned Commissioner and the assigned Administrative Law Judge (ALJ) issued a joint ruling reopening the evidentiary record and directing the Division of Water and Audits (DWA) to determine if Great Oaks had violated any Commission accounting or reporting requirements. DWA issued its Financial and Compliance Verification of Great Oaks (Verification Report) for the period from March 1, 2009–June 30, 2010. DWA found that Great Oaks was not in compliance with the Uniform System of Accounts (USOA) for Class A Water Companies, Decision (D.) 04-06-018 (rate case plan requirements), and Public Utilities Code Sections 451 and 794.<sup>3</sup>

As of August 13, 2010, SCVWD alleged that Great Oaks owed \$6,481,420 for pump tax and related interest and penalties. (SED Report at Attachment A.)

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<sup>2</sup> Unless otherwise indicated, all references to rules are the Commission's Rule of Practice and Procedure.

<sup>3</sup> Unless otherwise indicated, all section references are to the California Public Utilities Code.

On September 23, 2010, Great Oaks remitted, under protest, \$5,880,991 to SCVWD and agreed to continue to make payments to SCVWD when due.

D.10-11-034 ordered SED to prepare an order instituting investigation to further review whether Great Oaks' failure to inform the Commission and staff of its actions violated any of the following: (1) Rule 1.1; (2) the USOA for Class A water companies; (3) the rate case plan adopted by D.07-05-062;<sup>4</sup> (4) Section 451; or (5) Section 794.

SED issued the SED Report on April 11, 2012. The SED Report concluded that Great Oaks violated the Commission's USOA for Class A water companies, the Commission's rate case plan for Class A water utilities, and Sections 451 and 794. The SED Report concluded that Great Oaks had not violated Rule 1.1. The SED Report recommended opening an order instituting investigation and order to show cause why penalties should not be imposed for violations found.

Great Oaks states that it "has never requested that its ratepayers be responsible for any interest or penalty charges related to its withholding of pump tax expense payments from [SCVWD]," and that it "did not request or receive any amounts of money from its ratepayers (or any other party or person) for any interest or penalty charges related to its withholding of pump tax expense payments from SCVWD." (Declaration of Timothy Guster in Support of Great Oaks Water Company's Motion to Dismiss or For Summary Judgment at 2.)

### **3. Procedural Background**

On November 19, 2010, the Commission issued D.10-11-034 in A.09-09-001. In that decision, the Commission found that there was good cause to investigate

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<sup>4</sup> D.07-05-062 updated the rate case plan requirements for Class A water companies. It superseded D.04-06-018 referenced in the Verification Report.



Great Oaks' actions in connection with the pump tax revenues to determine if fines should be imposed. The Commission ordered SED to prepare an order instituting investigation to further review whether Great Oaks' failure to inform the Commission and staff of its actions violated any of the following: (1) Rule 1.1; (2) the USOA for Class A water companies; (3) the rate case plan required under D.07-05-062; (4) Section 451; or (5) Section 794.

On April 20, 2012, the Commission opened this proceeding by issuing the Order Instituting an Investigation on Whether Great Oaks Water Company's Failure to Inform the Commission and its Staff of its Treatment of Pump Tax Revenues Collected from Customers Violated the Commission's Rule of Practice and Procedure 1.1, the USOA for Class A Water Companies, the rate case plan, or Sections 451 and 794 (OII).

The assigned ALJ convened a prehearing conference (PHC) on June 29, 2012. At the PHC, the ALJ ruled that the required response to the order to show cause must be filed by Great Oaks on or before July 31, 2012.

On July 13, 2012 the parties submitted a List of Stipulated Facts (Stipulated Facts).

On July 31, 2012, Great Oaks filed the Response of Great Oaks Water Company to Consumer Protection and Safety Division Report and Order to Show Cause (Great Oaks Response).

On November 7, 2012, SED submitted its opening testimony. SED's testimony consisted solely of the SED Report which was the basis of the OII. Notably, SED had not updated the SED Report to reflect the Stipulated Facts. This left many statements in SED's written testimony at odds with the Stipulated Facts.

In a status call on November 16, 2012, Great Oaks proposed that this case could be resolved as a matter of law. Great Oaks proposed to suspend the current procedural schedule to allow Great Oaks sufficient time to prepare a motion for summary judgment and to allow SED sufficient time to respond. In an e-mail ruling on November 16, 2013, the assigned ALJ granted the motion.

On December 7, 2012, Great Oaks filed the MSJ and P&A, as well as declarations of Ruth Stoner Muzzin and Timothy S. Guster in support of the MSJ (Declarations). The Declarations attached various documents that had been produced by SED through the discovery process. Great Oaks asserts that there are no disputed material facts in this proceeding. Great Oaks further asserts that the undisputed facts establish that Great Oaks had not violated any of the statutes and Commission orders cited in the OII. In light of this, Great Oaks asked that the proceeding be dismissed.

On January 9, 2013, SED filed its response (SED Response) to the MSJ asking that the Commission reject the MSJ and continue with the investigation.

On January 23, 2013, Great Oaks filed its reply to SED Response.

#### **4. Issues Before the Commission**

The August 7, 2012 Assigned Commissioner and Administrative Law Judge's Scoping Memo and Ruling (Scoping Memo) determined that the issues to be addressed in this proceeding are:

1. Whether Great Oaks violated Rule 1.1;
2. Whether Great Oaks violated the USOA for Class A water utilities and Section 794;
3. Whether Great Oaks violated the rate case plan adopted by D.07-05-062;
4. Whether Great Oaks violated Section 451;

5. Whether Great Oaks was required under any other Commission decision, resolution, rule or other staff requirement to consult with the Commission or its staff on decisions made by Great Oaks in litigation that does not involve the Commission;
6. If violations are found, whether Great Oaks should be fined pursuant to Sections 2107 and 2108 for the above-described violations; and
7. If violations are found, whether, and to what extent, other remedies should be imposed.

## **5. Burden of Proof**

Staff bears the burden of proving its allegations by a preponderance of the evidence.

## **6. Standard of Review for MSJ**

An MSJ requires the Commission to determine if there are any disputed material facts, and, if there are no disputed material facts, whether the party bringing the motion can prevail as a matter of law. (Cal. Code Civ. Proc. § 437c; *Westcom Long Distance, Inc. v. Pacific Bell* (1994) [D.94-04-082].)

## **7. Discussion and Analysis**

### **7.1. No Disputed Material Facts**

If SED cannot demonstrate that a genuine issue of material fact exists, then Great Oaks is entitled to summary judgment as a matter of law. (Civ. Proc. § 437c, subds. (a), (p).) It is not sufficient for SED to rely on allegations to show that a triable issue of material fact exists; SED must identify the specific facts that show that a triable issue of fact exists. (*Id.*) SED failed to clearly identify a triable issue of material fact.

The parties submitted an extensive list of stipulated facts. This list contains the material facts necessary to resolve this investigation. Further, there are no additional material facts in dispute.

The Stipulated Facts include an agreement that Great Oaks' failure to highlight the withholding of pump tax did not have a dollar impact on the rates requested or received in A.09-09-011. (P&A at 10-11, citing Stipulations 21 and 22.) This stipulation does not address whether in the future there could be a monetary impact. SED alleges that this issue of future monetary impact is an open material triable issue of fact. However, any change in the treatment of ratepayers must be done through a rate proceeding and thus is not a fact material to this proceeding.

SED argues, correctly, that there may be a future monetary impact on ratepayers. On the one hand, if the appeals court decides in Great Oaks' favor, and SCVWD does not appeal the decision further, there will be a monetary impact: the customers will be refunded a large amount of money. On the other hand, if Great Oaks loses on appeal, Great Oaks may be required to pay interest on past amounts due and may be subject to penalties. In either case, Great Oaks will need to return to the Commission for authorization before applying a surcredit<sup>5</sup> or burdening ratepayers with the cost of interest and penalties.<sup>6</sup> In addition, Res. W-4534 states that the ratepayers' responsibility for litigation costs is capped at \$100,000.

SED contends that had Great Oaks told DRA about the treatment of the pump tax during the GRC, DRA would have explored additional areas that

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<sup>5</sup> Res. W-4534 requires Great Oaks to immediately lower rates and surcredit any dollars received for past overpayments.

<sup>6</sup> Great Oaks states that it "has never requested that its ratepayers be responsible for any interest or penalty charges related to its withholding of pump tax expense payments from [SCVWD]." (Declaration of Timothy Guster in Support of Great Oaks Water Company's Motion to Dismiss or For Summary Judgment at 2.)

might have led to other disputed facts. However, DRA learned of the withholding in March 2010, and SED has known about the withholding since April 2012 when this OII was instituted. During the six months between the issuance of the OII and SED's filing of its opening testimony on November 7, 2012, SED did not find any additional areas of potential disputed facts. As Great Oaks points out, if SED thought there were additional areas of disputed fact, it should have explored them during the discovery phase prior to filing SED's open testimony. Instead, SED's opening testimony consisted solely of the SED Report.

Based on this, there are no triable issues of material fact and the case may be resolved as a matter of law.

## **7.2. USOA and Section 794 Not Violated**

Section 794 permits the Commission to prescribe an order of accounts for entering particular outlays and receipts. Once the Commission has prescribed a system of accounts, "it is unlawful for such public utility to keep any accounts, records or memoranda for such business other than those so prescribed . . ." (Section 794.)

The parties now agree that Great Oaks did comply with the USOA, and thus there is no violation of Section 794.

USOA is the system of accounts that are prescribed for Class A water utilities to use when accounting for costs and revenues. Great Oaks asserts that the reporting treatment for these amounts is separate and different from the accounting requirements. (P&A at 7.)

SED has stipulated that the USOA does not include an account specifically for pump taxes and that Great Oaks' accounting treatment of pump tax operating expenses did materially comply with USOA. (Stipulated Facts 9, 10, 11, and 12.)

Because the USOA does not include a specific account for pump taxes or groundwater charges, Great Oaks recorded the pump tax in “Account 700 – Pump Tax.” Great Oaks has used the same accounting treatment for pump tax operating expenses for more than 40 years. (Stipulated Fact 11.) The Commission has recognized pump taxes levied against a water utility by a government agency as an operating expense for accounting and ratesetting purposes. (Stipulated Fact 10.) In addition, Great Oaks cites several documents provided by SED through the discovery process as supporting and confirming this treatment of pump taxes, including an e-mail acknowledging that the 700 series is the closest operating expense account numbers to use for pump taxes. (P&A at 8-9.)

### **7.3. Section 451 Not Violated**

Section 451 requires that rates charged by regulated utilities be “just and reasonable.” (Section 451.) SED has stipulated that Great Oaks’ alleged failure to inform the Commission of the withholding of pump tax payments did not have a monetary effect on rates in A.09-09-001. (Stipulated Facts 21 and 22.) Because treatment of pump taxes had no effect on rates set in A.09-09-001, Great Oaks did not violate Section 451 during A.09-09-001.

Great Oaks asserts that ratepayers were never in danger of having to pay unjust rates just because details of the pump tax withholding were not brought up in the 2010-2012 GRC. (P&A at 11.)

SED states that the ultimate outcome of the pump tax litigation could have an impact on rates. However, this point is moot, because this investigation centers on whether a violation of Section 451 occurred as part of A.09-09-001.

#### **7.4. Rate Case Plan Requirements Not Violated**

In D.07-05-062, the Commission adopted a rate case plan for Class A water utilities. The Rate Case Plan set the schedule for future GRC filings and adopted Minimum Data Requirements (MDR) to be completed by the water utility as part of its GRC testimony. The goal of the MDR was to reduce the need for discovery. (D.07-05-062 at 2, 21.) MDR include water quality data, requested revenue requirements and rate base for the proposed test year, “issues of controversy,” and other matters.

Notably, the MDR does not require submission of balance sheets. A balance sheet would have shown that pump tax revenues were not being paid to SCVWD (SED Report at 3.)

The SED Report found that Great Oaks filed the required MDR. (SED Report at 9.) Yet, in direct contradiction to this finding, SED asserts that Great Oaks violated the Rate Case Plan requirement by not providing sufficient answers to all of the MDR questions. (SED Response at 3-4.) The fact that SED itself continues to reach contradictory conclusions underscores the fact that the withholding of the pump tax revenues does not fall squarely within the express bounds of information required by the MDR.

##### **7.4.1. Issues of Controversy**

Great Oaks’ failure to include in the MDR information concerning the withholding of SCVWD pump taxes did not violate the rate case plan.

The MDR require the utility to report “issues of controversy.” Issues of controversy are not defined – the utility is simply asked to “[l]ist the major controversial issues included in the GRC filing. Include the dollar impact of these issues, and a brief summary of the utility’s rationale on this subject.” (D.07-05-062 at A-22.) The Commission has not provided any additional

guidance for interpreting this language. However, the term “issue of controversy” is commonly interpreted to mean an issue over which parties to a proceeding disagree. It does not commonly refer to outside lawsuits or litigation.

Great Oaks makes two arguments as to why the withholding of the pump tax was not a reportable “issue of controversy.” First, Great Oaks contends that, because the language asks for a dollar impact, non-monetary issues do not need to be reported. (P&A at 11 citing D.07-05-062, Appendix A at page A-22.) This argument twists the language of the MDR too far. If there is an issue of controversy that does not have a dollar impact, the utility must still include the issue, including the fact there is no dollar impact. For example, if there was a controversial issue involving a safety risk that did not have a dollar impact, this issue would still need to be reported. In addition, it is clear that the SCVWD litigation will have a monetary impact in the future if the court agrees with Great Oaks.

Great Oaks’ second argument, however, does support Great Oaks’ decision not to report information on the SCVWD litigation as an issue of controversy. Res. W-4534, which approved the request to set up a memorandum account to track SCVWD litigation expenses, expressly states that the pump tax litigation is not an issue that needs to be addressed in a general rate case. (Res. W-4534 at 7 (“The lawsuit does not raise any known critical issues that would require it to be analyzed in a General Rate Proceeding”).) Great Oaks relies on this statement when it determined that it did not need to list the litigation (or the related withholding of payment) as an issue in controversy.

Arguably, the withholding of the pump tax could be viewed as a separate “issue” from the underlying pump tax litigation. The withholding was not described as part of the litigation strategy when Great Oaks asked for approval



to set up the litigation expense memorandum account. Even so, it is not at all clear that the litigation or pump tax withholding was required to be reported as an “issue of controversy.” Moreover, Res. W-4534 provides evidence that the Commission was already aware of the litigation and that the Commission did not think it necessary to revisit the reasons for the litigation in a GRC. Given that the Commission was already aware of the litigation, DRA could have requested additional information during the GRC.

#### **7.4.2. Other MDR Reporting Requirements**

In the SED Response, SED identified two other MDR questions that might have required Great Oaks to report the withholding. Although these are new allegations, they are within the scope of this proceeding because the scope of this case includes any violation of the rate case plan requirements.

SED alleges that Great Oaks should have reported the pump tax treatment under “C. Revenue Requirements: Water Sales and Production 2) Total pumped water for the last authorized test year, last five years of recorded data, test year.” SED argues that in answering this question Great Oaks was required to state whether or not it had actually paid the pump tax to SCVWD. This MDR provision requires information regarding pumped water but it does not ask for the amount paid in connection with the pumped water. Therefore, Great Oaks was not required to report the withholding under this particular question.

SED also alleges that Great Oaks should have reported the pump tax treatment under “E. Supply and Distribution Infrastructure and Planning, 12) Concisely list all major water sources, including permit number or contract, remaining duration of entitlement, and any pending proceedings or litigation concerns any major source.” SED contends that in answering this question Great Oaks should have cited the litigation with SCVWD over pump taxes. This

question asks for information on litigation involving **water sources** – not information on litigation generally. Even if Great Oaks had elected to report the SCVWD litigation here, the information on the treatment of pump taxes would not necessarily have been included.

Despite the fact that a careful reading of the MDR questions shows that Great Oaks was not required to raise the issue of withholding of the pump tax revenues, Great Oaks nonetheless, out of abundance of caution, would have done well to do so. By volunteering potentially relevant information in an affirmative manner, Great Oaks may have been able to counter proactively any allegations regarding the withholding of the pump tax revenue and would have been able to frame the issue positively in its GRC application. For example, Great Oaks could have noted the withholding of the pump tax, and its reasons for doing so, in the MDR section II.B. “Revenue Requirement: Operations and Maintenance, Administrative and General, General Office.” The withholding involved a substantial portion of revenue collected from ratepayers, and the change in treatment was clearly significant to Great Oaks, its ratepayers, and SCVWD. Thus it was reasonable for DRA to be concerned when it learned from an outside source that Great Oaks had failed to pay the pump tax revenues to SCVWD.

#### **7.5. Rule 1.1 Not Violated**

Rule 1.1 states that parties may never “mislead the Commission or its staff by an artifice or false statement of fact or law.” (Rule 1.1) Here, the issue is whether by not affirmatively stating during the GRC that the pump tax revenues were being withheld from SCVWD, Great Oaks mislead the Commission by “artifice or false statement.”

An omission of relevant information that has the effect of misleading the Commission is an artifice in violation of Rule 1.1 even if the omission was unintentional. (D.01-08-019 at 8.) For example, if, as a result of the omission of information on the withholding of the pump tax, DRA was misled in its evaluation of the GRC, then Great Oaks could have been found to have violated Rule 1.1.

SED has repeatedly stated that Great Oaks did not violate Rule 1.1. (SED Report; Stipulated Facts at 25, 26.) The SED Report, which became the basis for the OII, concluded that, because Great Oaks had provided all information expressly required by the rate case plan, Great Oaks had not violated Rule 1.1. SED stipulated that “Great Oaks did not mislead the Commission or its staff by an artifice or false statement of fact or law.”

It is the role of the Commission, not staff, to make a legal determination as to whether Great Oaks violated Rule 1.1.

Based on the evidence provided, including the Stipulated Facts, the SED Report, and the Declarations, there is no evidence to suggest that DRA was misled by Great Oaks’ failure to advise the Commission of the pump tax withholding as part of its initial GRC application. Had SED alleged that the omission of information was in itself misleading, then further analysis of a possible Rule 1.1 violation would be necessary.

Therefore, Great Oaks did not violate Rule 1.1 by failing to advise the Commission of its treatment of the pump tax revenues at the start of the GRC.

#### **7.6. Remaining Issues Moot**

The issue of whether Great Oaks must consult the Commission on decisions made in litigation that do not involve the Commission was added to the scope of the proceeding at the request of Great Oaks. (Great Oaks PHC

Statement at 3.) In light of the analysis above, it is not necessary to reach a conclusion on this issue in order to resolve this proceeding. Therefore, this issue is moot.

It should be noted, however, that Res. W-4534 does not absolve Great Oaks of the requirement to report material developments in the litigation proceeding if those developments impact rates. For example, if the court agrees with Great Oaks and SCVWD refunds past pump tax amounts, Great Oaks is required to report this to the Commission. (Res. W-4534 at 7 (“[Great Oaks] will immediately lower rates and surcredit any dollars received for past overpayments”).)

#### **7.7. No Penalty or Sanctions**

Because no violations were found, there is no reason to fine Great Oaks pursuant to Sections 2107 or 2108. Similarly, there is no need to impose other remedies.

#### **8. Conclusion**

Because Great Oaks was not required to disclose the treatment of pump tax revenue as part of its initial GRC filing, and because DRA was not misled by the omission of information on the pump tax treatment, Great Oaks did not violate any of the identified statutes or Commission orders. Because there was no violation, no penalty should be imposed on Great Oaks.

#### **9. Need for Hearing**

The instructions to answer preliminarily determined that hearings are necessary in this case. As discussed above, this case can be resolved on the MSJ and therefore hearings are not necessary. We therefore change the initial determination that hearings are necessary and conclude that hearings are not necessary.

**10. Comments on Proposed Decision**

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

**11. Assignment of Proceeding**

Commissioner Michael R. Peevey is the assigned Commissioner and Jeanne M. McKinney is the assigned ALJ and Presiding Officer in this proceeding.

**Findings of Fact**

1. The pump tax revenue paid to SCVWD accounts for approximately 38 percent to 45 percent of Great Oaks' revenue requirement for test year July 1, 2010-June 30, 2011.
2. Great Oaks disputed the pump tax charged by SCVWD.
3. Great Oaks advised the Commission in advance of its intent to litigate the pump tax.
4. Great Oaks prevailed against SCVWD at the trial court level and SCVWD was ordered to pay Great Oaks \$4,623,096 plus interest for the 2005-2006 fiscal year.
5. SCVWD appealed the trial court decision.
6. For a period of time in 2009 and 2010, Great Oaks collected pump tax from its ratepayers, but did not pay the collected amounts to SCVWD.
7. Great Oaks held the unpaid pump tax in an interest bearing escrow account.
8. When Great Oaks filed its GRC application for the 2010-2012 rate cycle (A.09-09-001), Great Oaks did not include a statement that it was withholding payment of the pump tax.

9. Prior to the issuance of a decision in A.09-09-001, SCVWD informed DRA that Great Oaks had not been paying the pump tax.

10. In September 2010, Great Oaks began paying the pump tax to SCVWD under protest and repaid certain past due amounts.

11. D.10-11-034 in A.09-09-001 ordered SED to investigate whether Great Oaks' failure to inform the Commission and staff of its actions violated any of the following: (1) Rule 1.1; (2) the USOA for Class A water companies; (3) the rate case plan required under D.07-05-062; (4) Section 451; or (5) Section 794.

12. SED's case against Great Oaks is based on the findings in the SED Report.

13. There are no disputed material facts.

14. Great Oaks reported pump tax revenue as an operating expense.

15. The pump tax withholding did not change the revenue requirement used to determine rates in A.09-09-001.

16. Great Oaks provided all information required by MDR as part of the rate case plan.

17. Resolution W-4534 capped ratepayers' responsibility for litigation expenses at \$100,000.

### **Conclusions of Law**

1. Because there are no disputed material facts, this proceeding can be decided as a matter of law.

2. By reporting pump tax revenue under operating expense, Great Oaks did not violate the USOA.

3. Because Great Oaks complied with the USOA, Great Oaks did not violate Section 794.

4. Because the pump tax withholding did not impact the amount ratepayers were obligated to pay under D.10-11-034, Great Oaks did not violate Section 451.

5. Because Great Oaks provided all information required by the MDR, Great Oaks did not violate the rate case plan requirements.

6. An unintentional omission of information in an application can constitute a violation of Rule 1.1.

7. Because DRA was not misled by the omission of information on the treatment of pump tax revenue from the GRC filing for A.09-09-011, Great Oaks did not violate Rule 1.1.

8. For purposes of the MDR, an issue of controversy can exist where there is no monetary impact on ratepayers.

9. A memorandum account allows for costs and revenues to be tracked, but does not, without further Commission action, allow the utility to collect the balance from ratepayers.

10. In Res. W-4534, the Commission permitted Great Oaks to establish the litigation expense memorandum account subject to certain conditions.

11. In D.10-11-034, the Commission determined the rates and other matters in connection with Great Oaks' operations for 2010-2012.

12. This decision does not supersede the orders already made in Res. W-4534, D.10-11-034, or other Commission orders.

13. The initial determination in the instructions to answer that hearings are necessary should be changed, because we now conclude that hearings are not necessary.

## O R D E R

### IT IS ORDERED that:

1. All allegations brought by the Safety and Enforcement Division in this proceeding are dismissed.
2. Great Oaks Water Company is directed to file an update in its current and all future general rate cases on any litigation related to the Santa Clara Valley Water District (SCVWD) or the pump tax, the accounting treatment of the pump tax, and on any penalties or interest asserted by SCVWD. This order shall continue until such time as all pump tax litigation between Great Oaks and SCVWD is resolved.
3. Great Oaks Water Company is ordered to continue to comply with the ordering paragraphs of Resolution W-4534, Decision 10-11-034, and any other applicable statute or Commission order.
4. Hearings are not necessary to resolve this matter.
5. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.